Supreme Court, U.S.
FILED
JUN 12 1997
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(4)

No. 96-1809

In The
Supreme Court of the United States

October Term, 1996

SCOT A. REINERT,

Petitioner

v.

COMMONWEALTH OF PENNSYLVANIA

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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C. THE APPELLANT'S TRIAL COUNSEL WAS INEFFECTIVE IN FAILING TO CALL, DURING THE SUPPRESSION HEARING: (1) OFFICER MERTZ, THE FIRST POLICE OFFICER ON THE SCENE, TO GAIN A COMPLETE PICTURE OF POLICE ACTIVITIES ON SUNDAY, MARCH 10, 1991; (2) REINERT HIMSELF; (3) ONE OF APPELLANT'S TRIAL COUNSEL; AND (4) A MEDICAL EXPERT TO TESTIFY TO THE APPELLANT'S PHYSICAL AND MENTAL CONDITION; AND FURTHERMORE WAS INEFFECTIVE IN FAILING TO CALL AT TRIAL, (3) AND (4) ABOVE.

The Suppression Hearings of August 20 and 21, 1991 focused on the admissibility of Appellant's alleged statements to the police and of the items seized by the police's warrantless search on Sunday, March 10, 1991. Clearly, the mental and physical condition of Appellant, given his suicide attempts, wounds and subsequent medical attention, was of great import in aiding the court in deciding whether the Appellant could knowingly and voluntarily waive his **Miranda** rights. Of equal import to the court's decision, vis-a-vis the seized items, was whether, as the Commonwealth claims, the secondary search made by Detectives Stauffer and Granitz and Sgt. Moyer was indeed necessary to secure the crime scene and protect the police and the evidence. Remarkably, however, trial counsel failed to call, or insure the appearance of, either Officer Mertz, the first officer on the scene, an expert medical witness, Reinert himself, or one of appellant's trial counsel, who saw Reinert on the evening of Sunday, March 10, 1991, and could have testified, just as the Commonwealth witnesses did, as to his mental and physical condition.

I. FAILURE TO CALL OFFICER MERTZ OR RENEW MOTION TO SUPPRESS

To establish ineffective assistance of counsel, a defendant must demonstrate that: 1) The underlying claim is of arguable merit; 2) the counsel's performance was unreasonable; and, 3) the counsel's ineffectiveness prejudiced the defendant. **Commonwealth v. Williams**, ___ Pa. ___, 640 A.2d 1251 (1994), citing **Commonwealth v. Clemmons**, 505 Pa. 356, 479 A.2d 955 (1984). With regard to the meritorious nature of Appellant's claim that the Allentown police conducted an illegal and unconstitutional search and seizure, he respectfully refers this Honorable court to Section A of this argument. Supra, 1. Officer Mertz was the first person to respond to the scene, Appellant's home, on Sunday, March 10, 1991. His testimony at trial included a very specific description of his entrance to the Reinert home and his subsequent search for "figures" on all floors as he headed to the third floor to check reports of a body. His testimony also included his subsequent order to Officer Stauffer to secure the residence and report to the dispatcher. It is submitted that this testimony, in conjunction with Officers Zimmerman, Lembach and Brader's testimony of their securing both entrances to the home, performing a protective walk-through of the first floor, and maintaining control of the Mr. Reinert and his parents in the front living room, completes the picture of a secure crime scene, which obviated the purported need for Detectives Stauffer's and Granitz's later secondary warrantless search and seizure. Trial counsel failed to secure Officer Mertz's presence on the stand, his testimony was never heard by the judge at the suppression hearing, and was never included in the suppression court's deliberations. Alternatively, trial counsel should have renewed the Motion to Suppress at trial, upon the receipt of additional, supporting information, including the testimony of Officer Mertz.

Thus, the trial court's conclusion that the search conducted by Officer Stauffer was legal, due to the necessity

to secure the crime scene, and its reliance on this "legal presence" to support its conclusion that the seizure of items without a warrant fell under the plain view exception to warrantless searches, was erroneous, but in any event, was based on incomplete information. Supra p.4. The lower court's order denying defendant, Reinert's, request for suppression allowed the Commonwealth to offer into evidence, among other items seized at the time, the, it is submitted, illegally seized butcher knife, photographs and videotape itself, as well as notes which the Commonwealth used to support their "jilted lover" motive for the alleged homicide. Given the ease of obtaining Officer Mertz's presence, and the existence of a process by which a defendant can effect a compulsory confrontation of witnesses, the trial counsel's failure to elicit and secure Officer Mertz's presence and testimony at the suppression hearing was unreasonable. Further, there is no apparent strategic or tactical reason for not eliciting Officer Mertz's testimony, especially in light of the fact that prior counsel called all the other officers to the stand at the hearing, and there was no possible negative impact from the officer's testimony. Further, trial counsel was ineffective in not renewing, at trial, the motion to suppress, once Officer Mertz's testimony was revealed.

2. FAILURE TO INFORM REINERT OF HIS RIGHT TO TESTIFY

Reinert further submits that his trial counsel was ineffective in not informing him of his right to testify at the Supression Hearing, not discussing with him the possibility of his so testifying, and not calling him to discuss his physical and mental state on Sunday, March 10, 1991. See, Appendix "D," Affidavit of Scot A. Reinert, all of which would have made clear the strength of his suppression motion. Further, as Reinert's statements were the critical lynchpin in the Commonwealth's case, it was clearly ineffective and unreasonable to fail to call Reinert to the stand.

3. FAILURE TO CALL AN EXPERT MEDICAL AND PSYCHIATRIC WITNESS FOR THE SUPPRESSION HEARING AND/OR FOR TRIAL

Appellant further submits that trial counsel's failure to obtain an expert witness to testify, both at the suppression hearing, and at trial if any statements survived the suppression hearing, about Mr. Reinert's medical and mental condition at the time he made the statements, and his ability to knowingly and intelligently waive his constitutional rights, and voluntariness, was ineffective assistance of counsel. When a claim of ineffective assistance of counsel focuses on counsel's failure to retain expert witnesses, "the defendant must articulate what evidence was available and identify the witness who was willing to offer the evidence. " **Williams**, 640 A.2d at 1265, citing **Commonwealth v. Halloway**, 524 Pa. 342, 572 A.2d 687 (1990).

Among the pivotal issues presented and decided at the suppression hearing were Appellant's ability to waive his **Miranda** rights both in the ambulance and in the hospital given his mental and physical. [sic] The Commonwealth presented the observations of police officers, paramedics, and Appellant's surgical doctor to support its contention that Appellant's condition did not inhibit his judgment vis-a-vis his waiver of **Miranda** rights. In response, trial counsel called Mr. Reinert's parents, neither of whom have any medical training. However, again inexplicably, trial counsel failed to call an expert witness to the stand to testify, after review of Appellant's medical records, about Appellant's physical injuries and subsequent severe blood loss, and his mental state, including his attempts at suicide, on his cognitive ability and decision-making process. The ineffectiveness in this case is especially egregious as Reinert's prior counsel had informed him early on that such a witness would be obtained, and they had several discussions about the matter prior to the Suppression Hearing, and again prior to trial. See, Appendix "D,' Affidavit of Scot Reinert. It is

submitted that medical testimony, in conjunction with Appellant's injuries, the circumstances surrounding the police interrogation, and prevailing case law, See, supra 13, would have presented a meritorious case for the suppression of Reinert's statements.

Attached hereto are the reports and curriculum vitae of two expert witnesses. The first is Dr. Robert L. Sadoff, perhaps the leading psychiatrist in this geographic area, and the second is Dr. Lynn Allison Bornfriend. Doctor Sadoff's report is quite clear that, based on the totality of the circumstances at the time, including his physical and mental condition, Reinert was incapable of waiving his rights at the time he made the statement to Detectives Stauffer and Granitz in the hospital on the evening of Sunday, March 10, 1991. Affidavit of Dr. Robert L. Sadoff. Dr. Bornfriend's report is also quite clear that at the time Reinert made his statement to Officer Zimmerman in the ambulance, and at the time he made another statement to the detectives in the hospital, he was incapable of knowingly and intelligently waiving his **Miranda** rights. Appendix "B," Affidavit of Dr. Lynn A. Bornfriend.

Appellant contends that, given the ready availability of such witnesses and the favorable conclusions reached in their reports, it was plainly unreasonable for trial counsel to fail to secure and call such a witness. Similarly, given the fact that prior counsel was pursuing suppression based on Reinert's inability to make a knowing and intelligent waiver, there appears to be no reasonable tactical or strategic basis for not presenting such a witness to the court for consideration. Without this testimony, the trial court again made its determination as to the admissibility of the statements on incomplete evidence, and the incriminating statements, which were significantly relied on by the Commonwealth, were presented to the jury. Further, any delays in obtaining an appropriate examination of his physical and mental condition can only be recognized as extremely prejudicial.

Commonwealth v. Turiano, 601 A.2d 846 (1992))(Court found meritorious Appellant's argument that counsel was ineffective for failing to arrange a mental health examination in a timely fashion, and this ineffectiveness prevented Appellant from receiving an exam, crucial to his defense of insanity, at a point in time when the exam would be relevant to the defense). Therefore, Appellant respectfully requests this court to find trial counsel ineffective in her representation, suppress, reverse the conviction, and remand for a new trial.

4. TRIAL COUNSEL, ONE OR BOTH, SHOULD HAVE TESTIFIED IN THE SUPPRESSION HEARING AND AT TRIAL AND/OR WITHDRAWN IF NECESSARY.

Finally, Reinert contends that trial counsel was ineffective for failing to testify at Appellant's suppression hearing/trial, especially as trial counsel, two from the same firm, visited Reinert at the hospital the night of March 10, 1991, N.T., Vol. V, 160, and were in a position to testify as to his mental and physical condition. See, Appendix "E" and Appendix "F," Affidavits of Charles and Janet Ketner. One of Reinert's two counsel should have testified at the suppression hearing about Reinert's ability to waive his **Miranda** rights, and let the other remain counsel for the duration of that hearing. See, Rules of Professional Conduct, Rule 3.7[1], especially since the fact-finder at the suppression hearing was a judge, and the jury would be unaware that trial counsel ever acted as a witness. Or, barring that, counsel should have withdrawn as counsel to act as a witness in the proceedings. After the results of the suppression hearing were known, counsel could then determine whether they needed to testify at trial, and if necessary, they should have done so under the aegis of Rule 3.7, or have withdrawn to do so.

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[1] "(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness, unless precluded from doing so by Rule 1.7 or Rule 1.9 [Conflict of Interest Provisions]."

It is submitted that, on this record, this Honorable court can determine that trial counsel was ineffective. However, if this Honorable Court determines that it cannot determine whether trial counsel was reasonable in failing to call any of the above witnesses, Appellant respectfully requests this Honorable Court to vacate the judgment of sentence and remand for an evidentiary hearing on this issue. **Commonwealth v. Miller**, 430 Pa. Super. 297, 308, 634 A.2d 614, 619 (1993); **Commonwealth v. Free**, 301 Pa. Super. 425, 430, 447 A.2d 1041 (1982); **Commonwealth v. Fierst**, 423 Pa. Super. 232, 248, 620 A.2d 1196, 1205 (1993). The affidavits are included in order to comply and demonstrate the merits of Appellant's position.

IN THE COURT OF COMMON PLEAS OF LEHIGH COUNTY, PENNSYLVANIA

CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA

V.

SCOT A. REINERT

NO. 1128 OF 1991

DEFENDANT'S POST-VERDICT MOTIONS IN ARREST OF JUDGMENT AND FOR A NEW TRIAL

TO THE HONORABLE, THE JUDGES OF THE SAID COURT:

COMES NOW the Defendant, Scot A. Reinert, and states the following:

1. The court erred in denying the Defendant's Motion to Suppress all statements made by him for the reason that the Commonwealth failed to establish that the statements were made voluntarily and intelligently and that the contents of the statements were reliable.

2. The court erred in refusing to suppress all evidence seized from the home at 120 N. West Street, Allentown, PA, for the reason that said evidence was obtained without a proper search warrant, without exigent circumstances or any other legal justification for the seizure on March 10, 1991.

3. The Court erred in precluding a major component of the defense when it required that there could be no testimony mentioning the prescription drug Prozac (which Sean Brady was

taking for several months prior to his death,) either by name or by reference to "medication" unless an expert was called to testify to the effects of that drug. In accordance with a written offer of proof filed with the court and the various oral offers of proof, it was not the intent of the defense to prove what the actual effects of this very controversial drug are, but to offer the Defendant's observations of Brady's conduct after he began using the medication and of the arguments they had on the subject.

4. The Court erred in permitting the Assistant District Attorney to question prospective jurors in an attempt to "life-qualify" them, but without advising them that the sentence for first degree murder carries a mandatory sentence of life without parole as requested by the defense.

5. The Court erred in permitting the Commonwealth to play a videotape taken at 120 N. West Street, Allentown, PA, on March 10, 1991, for the reasons that said video was inflammatory, particularly in light of the fact that it dwelled at great length on the body of Sean Brady, taken from various angles. Said video did not have any probative value and was not useful for the jury's understanding of the case. Said video did not depict the scene at the time the police arrived at the home, but was recorded after various changes had been made at the scene, including the repositioning of the body. Said video was cumulative in light of all of the other photographs which were introduced at the scene and of the wounds.

6. The Court erred in granting the Commonwealth's Motion to Strike for Cause prospective jurors fifteen, Roger Hahn, and thirty-two, Michael Dalessandro, as those jurors indicated that they could follow the instructions as set forth by the Court.

7. The Court erred in denying Defendant's Motion to Strike for Cause prospective juror number forty-two, John

Heiney, in that said juror did not indicate that he could set aside the preconceived ideas he had and indicated that he would have difficulty following the instructions of the court.

8. The Court erred in allowing the Commonwealth to introduce Commonwealth exhibits 42, 43, 44 and 45, all being photographs of the body of Sean Brady, said photographs being inflammatory and their potential prejudice to the defense outweighing any probative value they had. Moreover, these photographs were cumulative and even if one or two were to have been properly introduced, introducing all four was cumulative and prejudicial to the defense.

9. The Court erred in allowing the Commonwealth to introduce exhibit number 57, the blood soaked T-shirt worn by Sean Brady, said T-shirt, which was repeatedly shown to the jury, being extremely inflammatory and being probative of absolutely nothing. Moreover, any probative value was far outweighed by the inflammatory and prejudicial nature of this exhibit.

10. The Court erred in allowing Thomas Gavigan, a Registered Nurse, to testify as an expert and to render his opinion that the all of the wounds sustained by Scot Reinert were self-inflicted, said witness not being properly qualified to render any such opinion and said opinion being a question of ultimate fact to be determined by the jury.

11. The Court erred in denying the defense request for a mistrial following Dr. Mihalakis' reference to the fact that the Defendant was incarcerated in Lehigh County Prison at the time he was examined by Dr. Mihalakis following this incident.

12. The Court erred in requiring defense counsel to turn over to the prosecution various notes prepared by the defense, which notes were work product and which notes were not substantially verbatim statements taken of any of the witnesses

who testified and were not adopted by the witnesses as their statements.

13. The Court erred in refusing the defense request to play the tape recorded by the Allentown Communications Center when Charles Ketner called to report the incident.

14. The Court erred in permitting the Commonwealth to call on rebuttal Detective Stauffer, who testified to nothing new; all of the matters covered on rebuttal having been previously covered in the direct testimony and/or not being relevant to anything other than collateral matters.

15. The Court erred in allowing the Commonwealth to call on rebuttal Anne Marie Orr and then erred in prohibiting the defense from properly cross-examining said witness on her testimony, said witness offering the hearsay statements of Sean Brady and said testimony not being proper rebuttal of any subject relevant to the jury's determination.

16. The Court erred in allowing the Commonwealth to call on rebuttal Susan Nienkawicz, said testimony not being proper rebuttal, not rebutting anything of relevance in the matter and/or being rebuttal only on a collateral issue raised by the Commonwealth.

17. The Assistant District Attorney committed misconduct when he referred to his closing argument to the fact that the victim could not come in and testify and that he could not rebut the allegations made by the defense and the Court erred in overruling the defense objection to this line of argument.

18. The Court erred in denying Defendant's Points for Charge 1, 2, 3, 4, 12, 17, 20, 21, 22, and 23.

19. The Court erred in instructing the jury that the

Defendant, who was present in his own home, had the duty to retreat in conjunction with the defense of self-defense.

20. The Court erred in sending Commonwealth exhibits 42, 43, 44, 45, 46, 48, 52, 53, 54, 67, 68, 102, 103, 107 and 115 out with the jury during their deliberations.

21. The Court erred in not sending out with the jury Defense exhibits 8 and 24, and Commonwealth exhibit 112.

22. The Court erred when, in response to a request from the jury, it sent in a redacted version of the note contained in the green notebook and in sending in only one of two notes offered by the defense which the jury had requested to see.

23. The Court erred in replaying the video taken at the scene at the request of the jury.

Respectfully submitted,

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